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MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-689

MICHAEL ANTHONY MANESS, *Petitioner,*

versus

THE HONORABLE JAMES R. MEYERS, *Respondent.*

On Writ of Certiorari To The 169th Judicial District Court of Bell County, Texas

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Since most of the Respondent's arguments have been anticipated and answered by the Petitioner's main brief, this Reply Brief will be limited to several issues which the Petitioner believes are of particularly critical significance to the ultimate disposition of this cause.[1]

1. Although the briefs of the parties have phrased and analysed the questions presented for review in different argumentative terms, there appears to be no genuine dispute that the ultimate issue for decision by the Court is whether, on this record, the Petitioner's advice to his client was constitutionally punishable by a judgment of criminal contempt.

1. A respectful strategic refusal to comply with a Trial Judge's order directing production of testimonial or documentary evidence by an individual who reasonably believes in good faith that he is privileged from producing the evidence has invariably been regarded by this Court as an appropriate, permissible and altogether legitimate alternative to involuntary compliance.

The totality of the Respondent's position is grounded ultimately on the insupportable assertion at page 7 of his brief that "the state court's order to produce the magazines *should have been obeyed* (even if, for the purpose of argument, the order was illegal), and counsel *should not have been given* by Petitioner to McKelva to disobey the order" (emphasis added). Page 9 of the Respondent's brief mistakenly reorchestrates the same theme by asserting that the Petitioner's client was under "the duty to produce the magazines even though the court's order was erroneous in overruling the claimed privilege."

In reality, this Court has consistently recognized that an individual whose claim of an evidentiary or constitutional privilege has been rejected by a Trial Judge may nevertheless lawfully test his entitlement to the asserted privilege in a higher forum by refusing to comply with a court order directing him to produce the allegedly privileged evidence. *Counselman v. Hitchcock,* 142 U.S. 547 (1892); *Hickman v. Taylor,* 329 U.S. 495 (1947); *United States v. Caldwell,* 408 U.S. 665 (1972); *cf. United States v. Reynolds,* 345 U.S. 1 (1953). The most recent example

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Consequently, the Petitioner does not rely on other alternative grounds that might conceivably support a reversal of his conviction—for example, possible claims that the judgment of contempt was imposed in a manner that failed to comport with procedural due process of law. *Cf. In re Green,* 369 U.S. 689 (1962).

involved the refusal by the President of the United States, on a claim of unqualified executive privilege, to comply with a District Court order directing him to produce tape recordings of presidential conversations. *United States v. Nixon,* ____U.S.____ [42 U.S.L.W. 5237, July 24, 1974]; see also *Nixon v. Sirica,* 487 F.2d 700 (D.C. Cir., 1973).

The controlling principles are provided by the Court's decision in *United States v. Ryan,* 402 U.S. 530 (1971). Ryan sought relief from an unappealable interlocutory order directing him to comply with what he contended was an illegal subpoena duces tecum, arguing that substantial burdens associated with compliance justified immediate review of the order. The Court rejected the claim in the following terms:

> "Of course, if [Ryan] complies with the subpoena, he will not thereafter be able to undo the substantial effort he has exerted in order to comply. *But compliance is not the only course open to* [*him*]. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, *he may refuse to comply* and litigate those questions in the event that contempt or similar proceedings are brought against him. * * * [the law provides] *a choice between compliance* with a trial court's order to produce prior to any review of that order, *and resistance* to that order with the concomitant possibility of an adjudication of contempt if [the] claims are rejected on appeal." 402 U.S. at 532-33 (footnotes omitted; emphasis added).

In short, contrary to the Respondent's mistaken impression, the Petitioner's client unquestionably enjoyed an indisputable legal right to persist in his claim of the Fifth Amendment privilege, even after the Trial Judge had rejected it. *Stevens v. Marks,* 383 U.S. 234, 246 (1966);

cf. United States v. Dickinson, 465 F.2d 496, 512 (5 Cir., 1972). Because immediate appellate review of the Judge's adverse ruling was not available, *Walker v. City of Birmingham*, 388 U.S. 307 (1967) and the other decisions cited at pages 9-11 of the Respondent's brief are not in point. *United States v. Ryan*, 402 U.S. at 532, n. 4.

Of course, involuntary compliance with the Judge's order to produce the magazines (coupled with a motion to suppress their use as evidence in any subsequent criminal proceedings) was *one* of the alternatives available to the client. *United States v. Blue*, 384 U.S. 251, 255 (1966). The Respondent's confusion arises from the misapprehension that it was the *only* alternative (A. 32). Obviously it was not.

2. An attorney who reasonably believes in good faith that his client's Fifth Amendment privilege against self-incrimination would be jeopardized by compliance with a Trial Judge's order directing production of testimonial or documentary evidence is constitutionally entitled to advise and counsel his client to refuse compliance with that order.

In light of *United States v. Ryan* the Respondent cannot realistically persist in his contention that the Petitioner's client was legally obligated to produce the forty-seven magazines following the Trial Judge's rejection of the asserted Fifth Amendment privilege. Logically, the Respondent can retrench to only one other position: although the client was legally entitled to disobey the court order directing production of the magazines, his attorneys were not legally entitled to advise him to do it. The implications of such an argument destroy it.

For example, when the Respondent asserts that "counsel should not have been given * * * to disobey the order," he presumably believes that the attorneys for the President in *United States v. Nixon* would have been guilty of contemptuous conduct if they had advised their client not to comply with the District Court's order on grounds of executive privilege. From this perspective Mr. Buzhart, Mr. St. Clair and Professor Wright could have stated their professional opinions regarding the possible validity or invalidity of Judge Sirica's order to produce the tapes but could not have advised the President of the United States whether or not to comply with it, even if he had specifically requested such advice from them.[2]

Imposing and defending a judgment of criminal contempt against an attorney on the basis of this sort of reasoning reflects, even when viewed most charitably, an astonishing and unexplainable insensitivity to the historical and contemporary obligations of the legal profession in our adversary system.[3] At the very least those obliga-

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2. Regrettably, the Respondent has not yet explained how presidential counsel (or, for that matter, any other lawyer) should respond if his client persistently demands to know which of the available legal alternatives sanctioned by *United States v. Ryan* should be pursued. An obdurate silence would appear to be no more appropriate than the answer, "I can't advise you what to do because advice based on my honest professional opinion would constitute a contempt of court."

With respect to the conceptual futility of the Respondent's attempted distinction between "advice" that a court order is unconstitutional under the Fifth Amendment and "advice" to disobey the order, see Note, "Liability of the Lawyer for Advising Disobedience," 39 Col.L.Rev. 433, 435-38 (1939).

3. "The primary role of counsel is to act as champion for his client. In this capacity he is the equalizer, the one who places each litigant as nearly as possible on an equal footing under the substantive and procedural law under which he is tried. Of course, as a practical matter he does this not by formally educating the client on every

tions demanded that the Petitioner attempt to preserve his client's claim of Fifth Amendment rights—not to undermine that claim by silence, inaction or timidity. *Harders v. California,* 373 F.2d 839, 842 (9 Cir., 1967).

Thus, regardless of whether the Petitioner's conception of the Fifth Amendment privilege is ultimately proven correct,[4] *United States v. Ryan* and the cases previously cited provided his client with an indisputable legal right to do precisely what his attorneys advised—to respectfully decline to comply with the Trial Judge's order directing production of the magazines until all available judicial avenues for relief from that order had been exhausted.[5]

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legal aspect of the case, *but by taking those procedural steps and recommending those courses of action which the client, were he an experienced advocate himself, might fairly and properly take.* A lawyer cannot be timorous in his representation. Courage and zeal in the defense of his client's interest are qualities without which one cannot fully perform as an advocate" (emphasis added). "The Lawyer as Professional Advocate" in *The Administration of Criminal Justice* (American Bar Association Project on Standards for Criminal Justice, 1974) at pp. 109-110.

"The defendant needs counsel not only to evaluate the risks and advantages of alternative courses of action * * * but also to provide a broad and comprehensive approach to his predicament which will take the most advantage of the protections and benefits which the law affords him. * * * [T]here are circumstances in which a lawyer must be vigorously aggressive if important rights are not to be undermined by an excess of cooperation with the court." *Id.* at pp. 112-13.

4. One of three indistinguishable District Court decisions cited at page 56 of the Petitioner's main brief in support of the Fifth Amendment claim has since been *summarily* affirmed by the United States Court of Appeals for the Sixth Circuit. *Smith v. Fair,* 363 F.Supp. 1021 (N.D. Ohio, W.D., 1973), *affirming without opinion,* 495 F.2d 1373 (6 Cir., 1974), *cert. pending,* 43 U.S.L.W. 3127 (September 10, 1974).

5. Although the Judge might have confined Michael McKelva under a *civil* (coercive) contempt judgment pending such review, *Shillitani v. United States,* 384 U.S. 364 (1966), the indiscriminate

Until now it has never been seriously suggested that an attorney has acted in a contemptuous or professionally irresponsible manner simply by having counseled his client to preserve a claimed Fifth Amendment privilege by refusing to comply with an unreviewed court order directing production of the evidence for which the privilege is claimed. Good-faith advice of that sort is not now and has never been constitutionally punishable by a judgment of criminal contempt. *In re Watts,* 190 U.S. 1, 29 (1903); *cf. Holt v. Virginia,* 381 U.S. 131 (1965); *In re McConnell,* 370 U.S. 230, 236 (1962).

3. The Trial Judge erroneously rejected the claim of the Fifth Amendment privilege against self-incrimination.

The Respondent's reliance on *Bellis v. United States,* ____ U.S. ____ [42 U.S.L.W. 4788, May 28, 1974] is misplaced. *Bellis* reiterates the established proposition that "an individual cannot rely upon the [Fifth Amendment] privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if those records might incriminate him personally." 42 U.S.L.W. at 4789. In the present case the privilege was claimed, not for business records lawfully possessed, but for magazines that were sought and withheld only on the theory that the very *fact* of possessing them for public sale or distribution might have constituted a criminal offense. That distinction is controlling.

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imposition of punitive criminal contempt sanctions against both client and counsel was in itself flagrantly unconstitutional because it unnecessarily tended to discourage a bona fide claim of Fifth Amendment rights. See *Lefkowitz v. Turley,* 414 U.S. 70 (1973) and related decisions cited on page 52 of the Petitioner's main brief.

Moreover, the *dictum* in the *Bellis* opinion that "corporate records do not contain the requisite element of confidentiality or privacy *essential for the privilege to attach*" (emphasis added). 42 U.S.L.W. at 4791, is simply not sustainable to the extent it suggests that a person may not invoke the privilege to resist an official demand for testimonial or documentary evidence that is *not* characterized by some undefined degree of "confidentiality" or "privacy." A subpoena duces tecum for an allegedly obscene publication or film that has been publicly displayed is no different in principle from a subpoena directing an individual to testify before a grand jury to the "public" facts that have previously been voluntarily revealed to the police by his own handwritten confession. In either event, because it is "the extortion of information *from the accused himself* that offends our sense of justice" (emphasis added), *Couch v. United States,* 409 U.S. 322, 328 (1973); *Holt v. United States,* 218 U.S. 245, 252 (1910), the communicative content of the evidence so extorted (whether "confidential" or not) is altogether irrelevant.

Michael McKelva's claim of the Fifth Amendment privilege obviously should have been sustained.

CONCLUSION

For the foregoing reasons the Petitioner respectfully suggests that the judgment of criminal contempt should be reversed and the Petitioner ordered discharged.

Respectfully submitted,

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